SERVED: April 29, 1993

NTSB Order No. EA-3864

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 16th day of April, 1993

JOSEPH M. DEL BALZO, Acting Administrator, Federal Aviation Administration, Complainant, v. AYOUB BARGHELAME, Respondent.	)	Docket SE-11108

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on November 19, 1990, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator revoking respondent's private pilot and second class medical certificates for violating

[1]The initial decision, an excerpt from the hearing transcript, is attached.

14 C.F.R. 61.15 and 67.20(a)(1).[2] We deny the appeal.

In his answer and at the hearing, respondent admitted that, between 1982 and 1985, he had six traffic convictions, five for speeding. In 1986, he was convicted of a controlled substance-related felony and of theft. Respondent's 1986 medical application reported none of these convictions.[3]

The elements of proof of fraud are 1) a false representation; 2) in reference to a material fact; 3) made with knowledge of its falsity; 4) with the intent to deceive; and 5) with action taken in reliance on the representation. Hart v. McLucas, 535 F.2d 516 (9th Cir. 1976) at 519, citing Pence v.

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[2]§ 61.15(a)(2) provides:

> (a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for--
>
> (2) Suspension or revocation of any certificate or rating issued under this part.

§ 67.20(a)(1) provides:

> (a) No person may make or cause to be made--
>
> (1) Any fraudulent or intentionally false statement on any application for a medical certificate under this part[.]

[3]The details of the six convictions, and another, are contained in the Administrator's complaint, ¶¶ 2-12. The law judge noted that the drug conviction occurred after the date of the medical application and, therefore, would not be considered. In view of this finding, the § 61.15 charge must be dismissed, and we modify the initial decision accordingly. This does not compromise the revocation action, however, because one intentional falsification will support revocation. See, e.g., Administrator v. Cassis, 4 NTSB 555 (1982), reconsideration denied, 4 NTSB 562 (1983), aff'd Cassis v. Helms, Admr., FAA, et al, 737 F.2d 545 (6th Cir. 1984).

United States, 316 U.S. 332, 338 (1942). Proof of an intentionally false statement requires the first three items. The representations of no traffic or other convictions in ¶ 21(v) and (w) of the medical application were admittedly false and, as testified to by witness Dickman, these were material facts. Tr. at 24-25. The chief issue at the hearing was the extent of respondent's knowledge and intent.

Respondent's affirmative defense -- that his English is poor, that he did not understand the questions, that his speeding tickets and criminal conviction had nothing to do with physical health, and that he did not associate questions on the application with anything but his health (see especially Exhibit R-1, a statement made by him) -- was rejected by the law judge, who concluded:

> I just find the respondent's answers here inconsistent. If he didn't understand the application form, then he would not have understood that it involved traffic convictions or these other convictions. He understood what they were asking for, but it was his interpretation of the document to mean that that didn't apply to these convictions he had.
>
> I just find that the defense that he didn't understand is just not acceptable under the evidence here today. . . . I find from the Respondent's own statement that he knew about the convictions, knew that the application called for a response about the convictions, and the only defense he has offered here today . . . [his interpretation that the application] didn't apply to his health . . . I'm not going to accept.

Tr. at 62-63.

On appeal, respondent claims that various procedural and substantive errors require dismissal of the complaint. We address his procedural arguments first.

Respondent argues that the law judge erred in accepting into the record three written witness statements, when respondent had no opportunity to confront these individuals. Respondent's argument must fail, however, because even if these statements were improperly admitted, the error was harmless. The law judge specifically stated that he was not going to read them and would give no weight to them. Tr. at 21. And, although there may be some confusion on this point in his discussion with counsel, the decision itself makes clear that he relied only on other evidence (and that, given that other evidence, these three exhibits are unnecessary to find that the Administrator met his burden of proof). Tr. at 60-63.

Respondent also argues that the initial decision is inadequate as a matter of law because, contrary to the Board's rule at 49 C.F.R. 821.42(b), it fails to state an ultimate finding whether respondent's conduct was found fraudulent or intentionally false.[4] Related to this claim is respondent's contention that the initial decision is not supported by substantial evidence and not in accord with precedent.

Although it is clear that the focus of the hearing was on respondent's knowledge and intent or lack thereof, we agree with respondent that the law judge failed to make certain specific findings underlying Hart v. McLucas.[5] Nevertheless, this failure

[4]Respondent does not argue that such a failure would require dismissal of the complaint, and does not indicate what relief he seeks.

[5]We have cautioned our law judges about similar omissions.

does not invalidate his decision. As the Administrator shows in his reply, and as indicated in the earlier discussion and quotation from the initial decision, the record established the false statements and their materiality. The law judge's language leaves no doubt that he found that respondent possessed the requisite knowledge to sustain a finding of intentional falsification.[6]

(..continued)
See, e.g., Alaska Island Air, Inc., NTSB Order EA-3633 (1992) at 3. We do so again here.

[6]We have already dismissed a motion for expedited review. NTSB Order EA-3430 (1991). In that order, we addressed in detail the decision in United States v. Manapat, 928 F.2d 1097 (11th Cir. 1991). Accordingly, while we accept respondent's supplemental brief attaching this decision (and the Administrator's response), we have already determined that Manapat is not controlling and does not require a finding that the application is vague. We also specifically found, contrary to respondent's argument, that, despite their placement under the heading "Medical History," and despite any questionable relevance, the two questions at issue are not confusing to a person of ordinary intelligence. We noted that the key question -- knowledge and intent -- would be determined by the law judge. His credibility determination here has not been challenged.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's motion to supplement is granted and his supplemental brief and the Administrator's reply are accepted into the record;

2. Respondent's appeal is denied;

3. The initial decision is modified as discussed in this opinion; and

4. The revocation of respondent's certificates shall begin 30 days from the date of service of this order.[7]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[7]For the purposes of this order, respondent must physically surrender his certificates to an appropriate representative of the FAA pursuant to FAR § 61.19(f).